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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 751.

EMILY V. HURLEY, and BARBARA ANN HURLEY, MARY CATHERINE HURLEY and EMILY LOUISE HURLEY, Infants, by EMILY V. HURLEY, Their Mother, natural guardian and next friend, *Petitioners*,

v.

SAMUEL S. LOWE, Deputy Commissioner, Bureau of Employees' Compensation, Federal Security Agency, FELDMAN, KITTELLE, CAMPBELL and EWING, and GLOBE INDEMNITY COMPANY, a corporation, *Respondents*.

BRIEF FOR RESPONDENT GLOBE INDEMNITY COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

COUNTERSTATEMENT OF THE CASE.

The complete facts upon which this case depends are succinctly set forth in the "Stipulation of Facts" (R. 6-7) and the "Supplemental Stipulation" (R. 7-8). It was upon these stipulations that the Deputy Commissioner based his "Findings of Fact" (R. 9-11).

However, to summarize: Decedent, George F. Hurley, who was associated with a law firm in the District of Columbia, was at the time of his death in Boston on a business trip on behalf of his firm. He spent the night of December 12, 1945 at his parents' home and on the following evening after his working day was over took them out to dinner at the Union Oyster House. He left the table of the restaurant where they were eating to assist his father, age 81, to the men's room. While helping the elderly man down a flight of steps, decedent slipped and fell, striking his head and fracturing his skull. He died a few hours later from the effects of the blow.

His widow and children filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U. S. C. A. 901, as made applicable to the District of Columbia, 45 Stat. 600. On the basis of the stipulations herein (R. 6-8), the Deputy Commissioner made "Findings of Fact" (R. 9-11) and concluded:

> "that the dinner which occasioned deceased's presence in the restaurant at the time of his injury was not related to his employment but was of social character and that his injury and death was not the result of an accidental injury which arose out of and in the course of his employment." (R. 10)

Suit was filed in the District Court of the United States for the District of Columbia asking a mandatory injunction to set aside the rejection of claim by the Deputy Commissioner and to compel an award to the widow and children of the decedent. (R. 1). Upon motion, (R. 11, 12) the court entered judgment dismissing the complaint (R. 13). An appeal was taken from this judgment to the United States Court of Appeals for the District of Columbia, which affirmed the judgment of the lower court on March 15, 1948. (R. 15.)

ARGUMENT.

A. The Question Involved Here Has Been Settled by This Court.

This is not a case in which certiorari should be granted for it falls definitely outside the rule of this Court defining appropriate cases in which appeals may be permitted from the United States Court of Appeals for the District of Columbia. The question presented by the petition here has been settled by this Court and the court below decided this case in accordance with that rule.

The question of the conclusiveness of the Deputy Commissioner's Findings in Workmen's Compensation Cases involved here has been recently considered and conclusively settled by this court in *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469. In that case this court reversed the United States Court of Appeals for the District of Columbia, which had set aside the Findings of the Deputy Commissioner and had substituted its own conclusions as to the facts and the law. In the present case the United States Court of Appeals for the District of Columbia has given proper effect to that definitive decision. The court below correctly concluded on the authority of that decision that the findings of the Deputy Commissioner in Workmen's Compensation cases must ordinarily be considered conclusive, when it stated:

> "The Supreme Court held that the ultimate inference, whether the accident involved did or did not arise out of and in the course of employment, was for the Deputy Commissioner, and said:
>
> 'Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. * * *
>
> '* * * If there is factual and legal support for that [the Deputy Commissioner's] conclusion, our task is at an end.' " (R. 17.)

The decision of this Court in the Cardillo case was in reality a restatement of the well-established principle that the findings of the Deputy Commissioner are conclusive on courts of review if supported by evidence and not inconsistent with law. This court has repeatedly so held. In *Voehl* v. *Indemnity Insurance Company,* 288 U. S. 162, 166, this Court, in reversing the United States Court of Appeals for the District of Columbia which had set aside the Findings of the Deputy Commissioner and substituted its own conclusions as to the facts and the law, said:

> "We think there can be no doubt of the power of Congress to invest the deputy commissioner, as it has invested him, with authority to determine these questions (whether the injury arose out of and in the course of the employment) after proper hearing and upon sufficient evidence. And where the deputy commissioner, following the course prescribed by the statute, makes such a determination, his findings of fact supported by evidence must be deemed to be conclusive. *Crowell* v. *Benson,* 285 U. S. 22, 46, 47; *L'Hote* v. *Crowell,* 286 U. S. 528.

Thus, on two separate occasions this court has found it necessary to reverse the United States Court of Appeals for the District of Columbia because of its refusal to accord to the findings of the Deputy Commissioner the conclusiveness to which they are entitled under the Act on this very question of whether or not an injury arose out of and in the course of the employment. Reluctantly, the Court of Appeals recognizes that this is the law and gives effect to the decisions of this court in the present case. This Court can best show its approval of the lower court's compliance with what has been established as the law by refusing to grant certiorari here. Thus can any possible doubts of the lower court best be resolved and the clear rule of law be given finality.

B. Deputy Commissioner's Findings Were Proper.

It is evident that in the present case the Deputy Commissioner properly discharged his duty of making the determination of whether or not the injury arose out of and in the course of the employment. His findings were rooted in the facts and in accordance with settled law. This determination of the scope of employment was here, as in most cases, a mixed question of law and fact which can only be determined by one charged with the duty of drawing inferences from the evidential facts.

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. *If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive.* No reviewing court can set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. [Citing cases.]
>
> "*It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted.* See *Boehm* v. *Commissioner*, 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable may not be disturbed by a reviewing court." (Italics supplied) *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 477.

1. *Deputy Commissioner's Findings were Rooted in the Facts.*

If the facts in this case were susceptible of various interpretations, the Deputy Commissioner had the obligation to put upon the stipulated facts that interpretation which to him seemed most logical; and every reasonable inference which favors the validity of the findings of the Deputy Commissioner should be indulged. In this case his every inference was based directly on the facts as stipulated between counsel and indeed the greater part of the findings followed the stipulation's almost verbatim. It was stipulated that the "dinner . . . was not related to George F. Hurley's employment in any way, but on the contrary, it was a family reunion of a purely social character." (R. 6.) Surely this justified the Deputy Commissioner's finding that "the dinner . . . was not related to his employment but was of a social character." (R. 10.)

Entirely aside from the limitations on the scope of judicial review, the Court of Appeals should have dismissed the appeal because the findings of the Deputy Commissioner were entirely sound and proper in the first instance. Factually, the Deputy Commissioner had every reason to infer that this dinner party was a purely social occasion bearing no relation to Mr. Hurley's employment. There was ample evidence in the Stipulations of Fact (R. 6-8) to support the belief on the part of the Deputy Commissioner that in making a trip to his home town, decedent was combining business with pleasure. He had spent the previous night at his parents' home. He had only one conference for his firm in the course of December 13th and that was in the morning. A telephone call completed his duties for his employer for the day. His time was his own for the rest of the afternoon and evening, and not until some time the next day was he required to be in a not distant Massachusetts town on firm business. He was not required to be at any particular place in the interim nor to account to his employer in any way for his time. And exactly as he would have been in Washing-

ton at the close of the business day, he was free to come and go as he chose on any personal business or pleasure. In fact, undoubtedly he had a great deal more free time that day than he would have had in Washington in the employment of his firm. And as he might have done, if his parents had been in Washington, in his leisure time and out of filial devotion he took them to a festive reunion at the celebrated Boston eating place, the Union Oyster House. The Deputy Commissioner was eminently justified in concluding that this was a social occasion completely unrelated to decedent's employment.

Furthermore, it must not be overlooked that the act of eating in a public restaurant was not the proximate cause of Mr. Hurley's death. His activity of the moment was assisting his aged father down the steps. That was the cause of his death, not any defect of the steps nor any hazard to which he was subjected by any necessity of eating in a restaurant. There were no such defects or hazards and, had George F. Hurley been alone, no injury would have occurred. It was solely the filial activity which created the hazard and brought about the death. Therefore, from a factual standpoint there was ample evidence for each of the Deputy's findings and for the ultimate finding that the "injury and death was not the result of an accidental injury which arose out of and in the course of his employment."

2. *Deputy Commissioner's Findings were in Accordance with Law.*

The Findings of Fact of the Deputy Commissioner were not only "not forbidden by law" but in full accordance with the law. The Court of Appeals indicated in its opinion that it understands the decision of this Court to be that an appellate court does not have the right to reverse the Deputy Commissioner in order to apply what it may consider the preferred legal principles when there is no "formal principle of law which would invalidate the choice made by

the Deputy Commissioner" (R. 17) quoting *Cardillo* v. *Liberty Mutual Co.*, 481-482. The court below was clearly right in recognizing that this was the rule laid down by this Court.

But the fact is that not only was the view of the facts taken by the Deputy Commissioner fully in accord with the decisions throughout this country, but the principle which the Court of Appeals would have preferred to substitute is without any foundation whatsoever and is a completely novel theory of what the law should be. The Court of Appeals suggests that the law should be that a man who goes to a place distant from his regular place of employment on the business of his employer "on a specific errand" (R. 17) is at all times in the course of his employment so long as the activity would normally be contemplated by the employer. His situation, the Court of Appeals believes, is not to be compared with the travelling salesman who "may, literally, live on the road." "His situation does not seem to be similar to that of one who is sent by his employer from his fixed place of employment upon a specific errand elsewhere." (R. 18.)

This is a novel concept. No cases are cited by the Court of Appeals to justify this theory, nor are any cases cited by petitioners for this proposition either in their brief in the Court of Appeals or in their brief in support of their petition here. This suggested distinction has not heretofore been entertained by any court nor apparently suggested by any litigant. Indeed, in several cases factually similar to the present one, compensation was denied although the claimant had been on a special mission for his employer and was not a travelling salesman. *Sullivan* v. *Industrial Commission of Utah*, 79 Utah 317, 10 P. 2d 924; *Dvyniek* v. *Buffalo Courier Express Co.*, 296 N. Y. 361, 73 N. E. 2d 552.

No clear reason is given by the Court of Appeals why a man on a specific errand should be covered by the statute during his leisure time while neither the person at leisure

in the same city as that of his employment nor the travelling salesman at leisure in a distant city should not be so protected. The Court of Appeals suggests that this one class should receive exceptional benefits that are denied to all others.

It asserts that the man on the specific errand should be considered to be in the course of his employment at all times so long as he does not indulge in "any activity which would not normally be contemplated by the employer as an incident to the errand." (R. 17.) But why the fact that the employer contemplates that the man on the specific errand should eat and sleep puts such activity in the course of employment, while the similar contemplation by the employer that the man in the same town as his employment shall eat and sleep and that the travelling salesman shall eat and sleep does not have the same effect, is not made clear. Why a "family reunion of a purely social character" should be held in the course of employment when indulged in leisure time by a man on a specific errand, while held not in the course of employment of an employee in his own home town or of a travelling salesman in a distant city, is not even suggested much less supported by authority. How the risk would be any different, or why the coverage should be greater, as between the several categories, does not appear.

The Court of Appeals did not specify what it considered would be "normally contemplated by the employer as incident to the errand" (R. 17) but the inference seems to be that as long as there is no misconduct on the part of the employee, he is in the course of employment. But surely the mere contemplation by an employer is not a valid basis for putting a purely social activity into the course of employment which would not otherwise be so. Indeed "contemplation" would prove a difficult and uncertain test to apply. It has not been suggested before as a workable principle and appears to have been invented for the occasion by the Court of Appeals.

But even if this novel theory suggested by the Court of Appeals should be applied to the instant case, the activity

in which the decedent was indulging at the moment and which caused his injury was not within the rule as laid down by the Court of Appeals, namely: "Any activity which would . . . normally be contemplated by the employer *as incident to the errand,* would . . . be in the course of employment." (Italics supplied.) Taking his parents to dinner was neither contemplated by his employer nor incident to his errand; and more particularly the activity of assisting his aged father to the men's room, which was the activity which brought about his death, was in neither category. Even if eating dinner could be considered within the course of employment it is well settled that it is the activity of the moment that governs. *Lunde* v. *Congoleum Nairn Inc.*, 211 Minn. 487, 1 N. W. 2d 606. Here the injury resulted from a risk that only existed because the deceased had turned aside from his dinner to perform a purely filial duty that could not have been contemplated by the employer nor considered as "incident to the errand." Accordingly, even if the Deputy Commissioner could have been aware of and had attempted to apply the Court of Appeals' novel theory of the law, his conclusion could only have been that the injury to decedent did not occur in the course of his employment and most certainly did not arise out of his employment.

But, of course, when the Deputy Commissioner made his findings in this case, he did not have the benefit of the Court of Appeals' novel views of the law and so was obliged to decide it in accordance with the law as he found it. At that time no court had held that travelling men were at all times in the course of employment. Certain typical situations have been generally held to be covered by the compensation acts, other have not. While each case must be considered with reference to its own particular facts, the general pattern of the decisions on this subject may be briefly outlined as follows:

Injuries incurred while the employee is actually in the course of his travel, are almost always held compensable.

Employers' Liability Assurance Corp. v. *Hoage,* 63 App. D. C. 53, 69 F. 2d 227. When a travelling man stays at a particular hotel for the purposes of his employer, so as to be on call at all times and is injured as a result of a hazard of the premises, he is also covered by the Act. *Souza's Case,* 316 Mass. 332, 55 N. E. 2d. 611. But where the employee stays at a hotel of his own choice without being on call, the weight of authority is that injuries there sustained are not compensable. *Davidson* v. *Pansy Waist Co.,* 240 N. Y. 584, 148 N. E. 715; *Gibb Steel Co.* v. *Industrial Commission,* 243 Wis. 375, 10 N. W. 2d 130. More specifically, it is held that a travelling man injured while eating during leisure time is not covered. In *Wynn* v. *Southern Surety Co.,* 26 S. W. 2d 691 (Texas Civil App. 1930), it was said:

> "* * * a travelling salesman while eating his meals, or sleeping at hotels, or attending churches or theatres or going on private errands for his own pleasure or profit is not within the contemplation of the Workmen's Compensation Act, engaged in his employer's business, and an injury received by him while performing such an act or engaged in such recreation is not within the purview of the act, received 'in the course of his employment'."

To the same effect are *Johnson* v. *Smith,* 263 N. Y. 10, 188 N. E. 140; *Scott Tobacco Co.* v. *Cooper,* 258 Ky. 795, 81 S. W. 2d 588. Against the great weight of authority there is only one case in all the reports which allowed recovery to a travelling salesman for accidental injury received in connection with eating a meal during leisure hours. That is the case of *Thornton* v. *Hartford Accident & Indemnity Co.,* 198 Ga. 786, 32 S. E. 2d 816 relied on in petitioner's brief at page 14. But even in this case, which is unique, the court in affirming the action of the local compensation board indicates that injuries received by an employee while engaged in social activities would not be compensable, saying at page 819:

> "This does not mean that he cannot step aside from his employment for personal reasons or reasons in no way connected with his employment, just as might an ordinary employee working on a schedule of hours at a fixed location. He might rob a bank; he might engage in other activities equally conceivable for his own pleasure and gratification, and ordinarily none of these acts would be beneficial or incidental to his employment and would constitute a stepping aside from his employment."

Without exception it has been held that travelling men indulging in personal or social activities are not in the course of their employment. As stated in *Sullivan* v. *Industrial Commission of Utah,* 79 Utah 317, 10 P. 2d 924:

> "* * * Plaintiff was not necessarily covered by the Industrial Act every moment of the time he was absent from Salt Lake City on this business trip. It was evidently intended that he might combine business and pleasure. It was possible for him to step aside from his employment and do things not at all connected with or incidental to his employment. When he left the train at Poughkeepsie to spend the afternoon and evening with his daughter and her friends, he did step aside from his employment to indulge in a personal pleasure wholly disconnected from the business for his employer. Even if it be considered that he did not step aside from his employment in choosing to sleep in a hotel at Poughkeepsie instead of New York City, still we think it must be held in entertaining his daughter and her friends at dinner and in taking the short journey wherein he undertook to accompany them to the college dormitory was a diversion purely personal and in no way prompted by, or beneficial to the interest of his employer." (10 P. 2d 925.)

To the same effect are *Gumbrill* v. *General Motors Corp., et al.,* 216 Minn. 351, 13 N. W. 2d 16 (1944) and *Lunde* v. *Congoleum Nairn, Inc.,* 211 Minn. 487, 1 N. W. 2d 606 (1942), which hold, in comparable factual situations to the instant case, that the travelling employee injured in his leisure time is not covered by compensation acts.

Without taking the space to analyze here the various cases on this subject cited in petitioner's brief, it can be stated that almost all those in which recovery was allowed are properly subsumed under one or more of the classifications listed above as compensable, e.g. where employee is actually in course of travel at time of injury or is required to stop at a particular hotel or eat his meals at a particular place to be on call for benefit of employer. All petitioners' cases without exception are clearly distinguishable from the present case. It can be positively stated, that none of them holds that an employee, (whether customarily travelling or away from his usual place of employment on a special mission), is entitled to recover for an injury received while not actually in course of travel or engaged in any work for his employer, but after he has reached his particular destination and during leisure time while engaging in some social activity of his own. In all such cases, where the condition or hazard giving rise to the accidental injury grows out of the social or personal character of the employee's activity at the time, compensation has been invariably and justly denied.

In deciding as he did, the Deputy Commissioner was therefore not only making a finding "not forbidden by law" but one which was "in accordance with the law" as almost universally interpreted. Therefore, the distinction that the Court of Appeals seeks to make between "not forbidden by law" and "in accordance with law" is of no importance here. Whether or not the terms are precisely synonymous and whichever test be applied to the Deputy Commissioner's findings here they clearly meet the requirements of legal and factual support and should accordingly be considered conclusive.

C. The Decision of the Court of Appeals Did Not Violate the Provisions of the Administrative Procedure Act.

To the assertion of petitioners that the Court of Appeals failed to follow the provisions of the Administrative Procedure Act respecting judicial review (60 Stat. 243, 5 U. S. C. A. 1009) little need be said. In the first place, petitioners did not invoke the jurisdiction of that Act either in the District Court or the Court of Appeals. It is not specified in their brief here in what respect the court below should have, or failed to give effect to the provisions of that Act. Section 10 of that Act, by its terms, provides for judicial review "except so far as statutes preclude judicial review." The Longshoremen's and Harbor Workers' Compensation Act provides that compensation orders may be set aside by the courts "if not in accordance with law." (Sec. 21 (b) 44 Stat. 1436, 33 U. S. C. A. Sec. 921 (b).) Judicial review was limited by this clause prior to the enactment of the Administrative Procedure Act and to this extent review is still limited under the Act.

CONCLUSION.

This case presents no question requiring review by this Court. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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